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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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11 HECTOR ROMO, ISAI LANDA
12 ARCILA, OLGA ANGUINA ESPINOZA,

Case No. C 08-002613 PVT

13 Plaintiffs,

ANSWER TO COMPLAINT

14 vs.

15 JOSE MUNOZ dba TAQUERIA
CONSUELITO and DOES 1-10, inclusive,

16 Defendants.

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18 Comes now Defendant JOSE MUNOZ dba Taqueria Consuelito and answers the
19 allegations of Plaintiffs' Complaint as follows:

20 1. Answering the allegations contained in Paragraph Nos. 1, 2, 3, and 11 of the
21 Complaint, Defendant has no information or belief sufficient to enable him to answer the
22 allegations of the paragraphs, and basing his answers on that ground, Defendant denies each and
23 every matter, fact and allegation contained therein, both generally and specifically.

24 2. Answering the allegations in Paragraph No. 4, Defendant Jose Munoz operates a
25 restaurant business in Livermore, California. With that express exception, Defendant denies each
26 and every remaining matter, fact and allegation contained therein, both generally and specifically.

1 3. Defendant admits the allegations contained in Paragraph No. 5.
 2 4. Answering the allegations contained in Paragraph Nos. 6, 7, 8, 9, 10, 14, 16, 17, 18,
 3 19, 21, 23, 24, 25, 26, 27, 28, 32, 33, 34, 37, 39, 40, 41, 42, 46, 47, 48, 49, 50, 52, 53, 54, 55, 57,
 4 58, 59, 60, 61 and 62, of the Complaint, Defendant denies each and every matter, fact and
 5 allegation contained therein, both generally and specifically.

6 5. Answering the allegations contained in Paragraph Nos. 12, 20, 29, 35, 43, 51 and
 7 56 of the Complaint, Defendant realleges his answers to the paragraphs referenced therein, and
 8 incorporates such answers by reference as though more fully set forth herein.

9 6. Answering the allegations contained in Paragraph Nos. 13, 15, 22, 31, 44 and 45
 10 Defendant avers that Plaintiff has set forth legal conclusions, not factual allegations and basing his
 11 answers on that ground, Defendant denies each and every matter, fact and allegation contained
 12 therein, both generally and specifically.

13 7. Answering the allegations contained in Paragraph Nos. 30, 36, and 38, Defendant
 14 avers that the allegations are vague and unintelligible, and to the extent Defendant understands the
 15 allegations, Defendant denies each and every matter, fact and allegation contained therein, both
 16 generally and specifically.

17 **AS A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE**, Defendant alleges that the
 18 Complaint fails to set forth facts sufficient to constitute a cause of action.

19 **AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE**, Defendant alleges that
 20 the Complaint fails to state a claim upon which relief can be granted.

21 **AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE**, Defendant alleges that this
 22 Court lacks subject matter jurisdiction.

23 **AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE**, Defendant alleges that
 24 the Complaint is barred by applicable principles of waiver and/or estoppel.

25 **AS A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE**, Defendant alleges that the
 26 Complaint is barred for Plaintiffs' failure to exhaust administrative remedies.

1 AS A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that the
 2 Complaint is barred by the doctrine of unclean hands.

3 AS A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that
 4 any claims presented by the Complaint have been extinguished by a release.

5 AS AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that
 6 any claims presented by the Complaint have been extinguished by payment.

7 AS A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that
 8 Plaintiffs' claims are barred, in whole or in part, by applicable statutes of limitations, including
 9 without limitation, California Code of Civil Procedure sections 337, 338, 339, 340, and 343,
 10 Business and Professions Code section 17208, and 29 U.S.C. § 255.

11 AS A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that the
 12 alleged losses pertaining to overtime payments are insubstantial. Absent such substantial injury to
 13 employees who may benefit by the protections of California Business and Professions Code
 14 Section 17200, the causes of action based upon California Business Professions Code Sections
 15 17200 and 17043 are without merit.

16 AS AN ELEVENTH SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges
 17 that Plaintiffs' losses occasioned by the allegations of the Complaint could have reasonably been
 18 avoided by the Plaintiff.

19 AS A TWELFTH SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges that
 20 all causes of action presented by the Complaint have been extinguished by an accord and
 21 satisfaction.

22 AS A THIRTEENTH SEPARATE AND AFFIRMATIVE DEFENSE, Defendant alleges
 23 that any claims presented by the Complaint are barred by the doctrine of laches.

24 AS A FOURTEENTH SEPARATE AND AFFIRMATIVE DEFENSE, the claims for
 25 waiting time penalties should be denied because a good faith dispute exists as to whether any
 26 wages are due.

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1 AS A FIFTEENTH SEPARATE AND AFFIRMATIVE DEFENSE The claims are barred
 2 in whole or in part because Plaintiffs are statutorily exempt employees under the applicable
 3 sections of the California Labor Code and/or Industrial Welfare Commission Wage Orders and/or
 4 the Fair Labor Standards Act.

5 AS A SIXTEENTH SEPARATE AND AFFIRMATIVE DEFENSE, as applied to the
 6 allegations in the Complaint, the provisions of Cal. Business and Professions Code section 17200
 7 et seq. violate Defendant's rights to substantive and procedural due process under California
 8 Constitution Article I, Section 7.

9 AS A SEVENTEENTH SEPARATE AND AFFIRMATIVE DEFENSE, Defendant
 10 presently has insufficient knowledge or information on which to form a belief as to whether he may
 11 have additional, as yet unstated, defenses available and, therefore, reserves the right to assert
 12 additional affirmative defenses in the event discovery indicates that they would be appropriate.
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14 WHEREFORE, Defendant Jose Munoz prays, as follows:

- 15 1. That the within Complaint be dismissed, in its entirety, and with prejudice;
- 16 2. That Plaintiffs take nothing by way of the Complaint;
- 17 3. For costs incurred;
- 18 4. For reasonable attorneys' fees;
- 19 5. For such other and further relief as this Court may deem just and proper.

21 Dated: July 15, 2008.

DAVENPORT GERSTNER & McCLURE

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 24 JEFFREY G. McCLURE
 25 Attorneys for Defendant,
 26 JOSE MUNOZ dba TAQUERIA CONSUELITO
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PROOF OF SERVICE

I declare that I am employed in Contra Costa County, California, I am over eighteen years old, and I am not a party to the within action, and that my business address is 1990 N. California Blvd., Suite 650, Walnut Creek, California 94596. On this date, I served the following document(s): ANSWER TO COMPLAINT on the persons shown below by placing true copies thereof in sealed envelopes addressed as shown below, by the following means of service:

[X] By First-Class Mail – I am familiar with the firm’s practice for collecting and processing correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in Walnut Creek, California, for mailing to the office of the addressee following ordinary business practices.

[] By Personal Service – I caused each such envelope to be given to a courier messenger for personal delivery to the addressee.

[] By Overnight Courier – I caused each such envelope to be given to an overnight mail service at Walnut Creek, California, for delivery to the addressee on the next business day.

[] By Fax – I caused each such document to be transmitted by facsimile transmission from fax machine telephone number (925) 932-1961, before 5:00 p.m., to the parties and fax numbers listed below. I declare that the transmitting fax machine reported that the transmission was complete and without error, and properly issued a transmission report, a copy of which is attached to this Proof of Service.

Mr. James Dal Bon
Law Offices of James Dal Bon
28 N. First Street, Suite 210
San Jose, CA 95113

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Walnut Creek, California.

Dated: July 15, 2008.

Alice Garcia
ALICE GARCIA